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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 558

R. H. NYE AND L. C. MAYERS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA AND W. B. GUTHRIE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONERS.

J. BAYARD CLARK,
L. R. VARSER,
R. A. MCINTYRE,
O. L. HENRY,
Counsel for Petitioners.

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Opinion Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in this case (R. 168-174) reported in 113 F. (2) 1006. There was no opinion in the trial court filed other than the findings of fact and judgment (R. 153).

Jurisdiction.

This Court has plenary jurisdiction to review upon writ of certiorari any judgment of the Circuit Court of Appeals and to make a complete review of such decision.

Judicial Code, Section 240, 28 U. S. C. A., Section 347.

The jurisdiction of this Court to determine what cases shall be reviewed on certiorari is plainly given and the power is not limited.

Ex Parte Chetwood, 165 U. S. 443;
Warner v. *New Orleans,* 176 U. S. 474;
Title Guaranty and Surety Co. v. *U. S.,* 222 U. S. 401.

The contempt of which the plaintiffs were convicted, if contempt at all, must be civil contempt. There is no allegation or suggestion of a commission of a crime, or an affront to the court in session or any interference with its functioning, in the evidence or findings (R. 153).

From the entire record it appears that this matter has been treated as a civil contempt arising in the main suit. The petition for the writ of certiorari was timely (Sec. 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. C. Title 28, Sec. 350).

The petition was filed November 7, 1940. It is clearly within ninety days from August 30, 1940, when the Circuit Court of Appeals entered its judgment and handed down its opinion (R. 168-174).

Concise Statement of Case.

Petitioners, respondents in the District Court, appellants in the Circuit Court of Appeals, were cited to appear by an order to show cause why they should not be attached for contempt. This order recites that the attorney for the plaintiff had moved the court and that W. H. Elmore had testified, "to facts that the said R. H. Nye and L. C. Mayers had been guilty of misbehavior contemptuous of this Court." The trial court proceeded under Judicial Code, Section 268, U. S. C. A. 385. A trial was had and the petitioners were convicted of contempt and fined, as follows: R. H. Nye $500.00 fine, and $500.00 required to be paid to W. B. Guthrie, attorney, and costs, and Mayers a fine of $250.00 (R. 158).

Petitioners raised the questions presented by appropriate motions to dismiss the order to show cause (R. 13-16), and reserving these exceptions to a denial of the same, filed answers under oath (R. 17-20), denying that they were guilty of contempt and stating that petitioners had no intention to reflect upon the court to obstruct its processes or to interfere therewith (R. 20-24), and exceptions were made to the denial and respondents' motions to dismiss and to dismiss at the close of all the evidence (R. 16). The court reserved its decision and continued all matters until November 17, 1939. From the judgment entered an appeal was had to the Circuit Court of Appeals for the Fourth Circuit (R. 165), and this Court affirmed the judgment to the District Court (R. 168-173). The petition for certiorari was granted by this Court (R. 175).

This contempt proceeding was initiated by plaintiff's attorney, Guthrie, charging in his motion (R. 9-12) that the petitioners' conduct had caused the plaintiff Elmore to file a final account and to ask for the dismissal of his suit when he did not know what he was doing. Guthrie's motion was in right of Elmore plaintiff and to protect an alleged threatened invasion of plaintiff Elmore's rights in which Guthrie was rendering service. Petitioners contend that a civil contempt cannot be based upon that portion of Judicial Code 268 U. S. C. A., Section 385 which relates to misbehavior "so near thereto as to obstruct the administration of justice."

W. H. Elmore, Administrator of James Elmore, deceased, sued the B. C. Remedy Company, a partnership consisting of C. T. Council and Germain Bernard, in the District Court, at Durham, North Carolina, for damages on account of the wrongful death of James Elmore, his intestate (R. 1-4). The plaintiff alleged that the death of his intestate was caused by the defendants in putting upon the market a certain headache remedy to which his intestate

had become addicted to such an extent that he died therefrom. The jurisdiction of the District Court was based on diversity of citizenship. Plaintiff resided in South Carolina, but had qualified as administrator of his intestate in Robeson County, North Carolina. This action matured and later the defendants filed a motion to dismiss (R. 7), alleging that plaintiff had filed his final account as administrator of his intestate in the Superior Court of Robeson County, North Carolina, and had been discharged from his trust and was thereby unable longer to prosecute his suit.

A hearing was had on this motion in the District Court September 29, 1939. W. H. Elmore (R. 7-8) in substance then testified that Mayers at the instance of Nye, came to him in South Carolina and gave him liquor and told him Nye wanted him, Elmore, to come to Lumberton, and that Mayers had come for him, and Nye wanted to see him, Elmore, "about the case I had in the Federal Court against B. C. Remedy Company". "He got me intoxicated and persuaded me to go with him to Lumberton right then" (R. 7). Elmore further testified that he had no opportunity to consult his lawyer and that Nye told him there was nothing in the case (referring to the suit against B. C. Remedy Company), that Lawyer Carlyle, a good lawyer, said there was nothing to it and that Nye's daughter had married a son of the defendant Council and that Nye was anxious to get the case stopped. Elmore further testified that he was kept full of liquor through the night and that next day the papers about Elmore's final account as administrator were fixed up by Nye's lawyer and that he did not have a chance to communicate with his lawyer and all this was done while I was drunk (R. 31, 49). Elmore further testified that he had no education; that his occupation was a cottonmill hand and he did not want the case stopped, but wanted it tried (R. 8).

The testimony above set forth is that referred to in the order to show cause (R. 8).

The petitioners filed motions to dismiss (R. 9, 10, 11, 12). These motions challenge the jurisdiction of the Court on the ground that the petitioners were residents of Robeson County, North Carolina in the Eastern District, and that none of the matters alleged happened in the Middle District, and related to matters concerning the probate of Robeson County, North Carolina solely, and by amendment challenging the sufficiency of the motion filed September 30, 1939, on the ground that it was not verified. This amendment to these motions was filed November 17, 1939 (R. 35), a date to which the Court had continued the hearing (R. 37). On October 30, 1939 (R. 16), which was the return day of the order to show cause, the trial court denied defendants' motions and was of opinion that the question to be determined was whether the respondents, or either of them, are guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice and this is a matter of fact to be determined by the evidence and not on motion. The respondents at the close of the evidence moved to dismiss, and these motions were denied, and exceptions reserved (R. 16).

The answers of the petitioners denied the allegations set forth in the motion filed by the plaintiff's attorney (R. 17-20) and set forth their version of the transaction in substance as follows:

Petitioner Nye says that Elmore appeared at his office where he was, near Lumberton, when he was busy and that Mayers was with Elmore. When Nye saw Elmore he appeared to be normal and not under the influence of liquor. That Elmore stated that he had moved to South Carolina and was living with his daughter. Nye already knew that Elmore for several years had lived near the National Cot-

ton Mill settlement, not far from Nye's place of business. That Elmore stated that he was in bad health and did not desire to be troubled with a law suit in the Federal Court, at Durham, and wanted to get rid of the suit and the administration, and asked Nye to help him; that Nye told him he did not know what to do about such matters and at that time of day he did not think he could get the lawyer who usually attended to Nye's matters, but called and found this lawyer was out of town; that Elmore was anxious to return to South Carolina, but waited until next morning; that Elmore did not want to stay at the hotel or at Mayers' home and Nye offered to let Mayers and Elmore occupy a room at his home in Lumberton. That Nye was not taking his meals at home at that time and advised Mayers and Elmore that he would be away from home until late at night and would probably leave in the morning before they got up, but they could take meals at Nye's expense, at his brother's place, and that he did not see either Mayers or Elmore until next morning he found them at breakfast there. That Nye went with Elmore to a lawyer's and stated to his lawyer Timberlake, in the presence of Elmore, the request that Elmore had made the previous evening; that Timberlake then talked with Elmore and determined what should be done and that the respondent Nye had nothing to do further with the matters until he went to the office of the Clerk of the Superior Court of Robeson County with Elmore and said nothing to Elmore whatever, but did pay $1.00 costs when the Clerk requested Elmore to pay it and he did not have the money and that he thereafter left the Clerk's office with Elmore, saw nothing more of him after advising Mayers, who took Elmore home. Nye alleges that he did not give Elmore, directly or indirectly, any liquor and was without knowledge that anybody else had given him any liquor and that he had no knowledge

or suspicion that Elmore was not in his right mind and normal and that he made no inducements to Elmore in the matter whatever. Nye admitted that his daughter married a son of one of the defendants in the main suit, but says he never discussed the matter with his son-in-law, or with either of the defendants, and no request had been made by either of them concerning this matter and that he was merely attempting to aid his friend Elmore who asked him about getting clear of the suit and his administration.

Nye says that petitioner Mayers is a tenant on his farm and that he did not send Mayers after Elmore, or bear any expense of his trip, and that he did not give him any liquor or pay for any. Nye further says that the only thing he ever said in respect to Elmore in Mayers' presence was several weeks before Elmore appeared at his office that Elmore had instituted a suit against the B. C. Remedy folks and that since his daughter had married the son of one of the parties, he would be glad if Elmore would dispose of the suit and not trouble them any more and that Mayers said that he knew Elmore and if he had an opportunity to do so he would speak to him about it. Nye further says that he did not intend to interfere with the court or have anything to do with it, and that the papers filed were in the probate court of Robeson County, which had full jurisdiction over such matters and that at no time did he intend to interfere with, or have in mind any disrespect for or interference with the District Court, at Durham.

Mayers says in substance (R. 18-22) that he had a conversation with Nye, as stated in Nye's answer, and that he wanted to see Elmore about some timber in Elmore's then community, and that he would speak to Elmore about the case. That on April 18th he went to South Carolina and found Elmore in a field at work and after inquiring about the timber Elmore spoke about the law suit, said he was much worried about it—had given him concern and trouble

and that he was unable physically and financially to attend to it at such a distance and wanted to drop it, and that a Mr. Carlyle, a lawyer in Lumberton, had advised him about it with reference to the strength of the case, and that he worried about it and that Mayers then told Elmore, who knew Nye, that he had talked with Nye and that Nye was interested in it because his daughter had married into the family which was connected with the B. C. Company and that Elmore requested respondent to take him to Lumberton, and he did so, and carried Elmore to the office of Nye, at Lumberton, and there he learned that the matter could not be attended to on that date, because a lawyer could not be had that night; whereupon, it was agreed that Mayers and Elmore should spend the night at Nye's home and the matters should be transacted the following morning and that he did spend the night with Elmore at Nye's home and had breakfast with Elmore at a cafe operated by Nye's brother and that Elmore left with R. H. Nye after breakfast and met him at a garage according to appointment. Mayers further stated (R. 93) that he did not know anything about court procedure, or what Elmore and Nye had in view with reference to the law suit until after Elmore had started back to South Carolina with him, when Elmore said he had got rid of the case and was glad of it, that it had been worrying him for a long time. Mayers said he did not drink any whiskey with Elmore or in his presence, and did not give Elmore any liquor, and that Elmore drank no liquor while in his presence and that he had nothing to do with Elmore's acts with reference to the law suit. That what he did was result of his friendship for R. H. Nye and did not intend to interfere with the District Court and he says that the Clerk of the Superior Court of Robeson County has full probate jurisdiction, including the administration of estates.

The petitioners were permitted November 17, 1939, to file an amendment to their motions, expressly setting up that the motion filed September 30, 1939, by plaintiff's attorney (R. 9) was unverified and not sufficient to give jurisdiction to issue the order to show cause. Motions had already been filed on 30 October, 1939 (R. 9-10), challenging the jurisdiction of the probate court to proceed on the order to show cause.

These motions by respondents, petitioners here, to dismiss the rule to show cause (R. 12-13) were all denied with appropriate exceptions reserved, as well as motions to dismiss at the close of all the evidence, and the specification that the motion was unverified was permitted as a part of the original motions.

The petitioners have always contended that an affidavit is a necessity for the issuance of the order to show cause and that such affidavit must be made for this purpose and not for some other purpose.

Petitioners have always contended that they were not guilty on the facts and that the evidence of the witnesses Elmore were totally insufficient to support a conviction for contempt and that the evidence submitted by the witnesses for the petitioners presented facts greatly demonstrating that petitioners were not guilty of misbehavior so near to the presence of the court as to interfere with the administration of justice therein.

Petitioners also contended that there was no primary basis for the contempt proceeding to stand upon after March 13, 1940, when plaintiff Elmore, Administrator, submitted to a voluntary nonsuit which was entered by the District Court. The contempt proceeding was treated by the trial court as in and a part of the suit for damages for wrongful death and was styled accordingly with its title, although based upon Judicial Code, Section 268, U. S. C. A. 385, under the clause "so near thereto", as to constitute an

obstruction to the administration of justice in the District Court and since the contempt was in aid of the plaintiff Elmore administrator that such plaintiff had the right and power when approved by the court to dismiss his suit for damages and end the whole proceeding and that he did so and such action did end the contempt proceeding.

Specification of Errors Assigned.

1. WAS THIS CONTEMPT PROCEEDING PROPERLY CONSTITUTED WITHOUT AN AFFIDAVIT MADE FOR THE PURPOSE OF SUPPORTING THE ORDER TO SHOW CAUSE, AND DID THE COURT HAVE JURISDICTION THEREOF?

2. WERE THE RESPONDENTS GUILTY OF CONTEMPT?

3. DID THE JUDGMENT OF NON-SUIT RENDERED HEREIN BY CONSENT OF PLAINTIFF ON 13 MARCH, 1940, UNDERMINE AND RENDER THE JUDGMENT AGAINST RESPONDENTS IN CONTEMPT, VOID?

Summary of Argument.

Petitioners summarize their contentions as follows:

1. That the contempt proceeding in the District Court was not properly constituted without an affidavit made for the purpose of supporting the order to show cause and that this affidavit is a jurisdictional requirement and the failure to have such supporting affidavit deprived the court of jurisdiction to proceed for contempt. The alleged misbehavior did not occur in the presence of the court and petitioners contend that it did not occur "so near thereto" as to obstruct the administration of justice.

2. The respondents contend that they were not guilty of contempt and that the transaction had with the plaintiff Elmore was a private matter cognizable only, if at all, in a proper suit between the parties and insofar as it affected the status of Elmore as administrator and his right to continue the suit for damages, such matters belong to the pro-

bate court in which Elmore, administrator, qualified; and in the District Court as to whether he could lawfully maintain his suit for damages. Petitioners further contend that the facts as shown by the testimony of all the witnesses is not such as to support a conviction for contempt.

3. Petitioners contend further that plaintiff Elmore, Administrator, suffered a voluntary non-suit on 13 March, 1940, and that such judgment ended the primary action, to-wit, "W. H. Elmore, Administrator of James Elmore, deceased *vs.* Council and Bernard, trading as B. C. Remedy Company," and, therefore, there was nothing after such non-suit upon which the contempt proceeding could be supported. This proceeding has at all times been treated by the District Court as a civil contempt. It fashioned its order to show cause and its findings of fact and judgment by adopting the title in the suit for damages, and the District Court proceeded with it as a matter in that primary suit and, therefore, the contempt proceeding was undermined and left without support.

ARGUMENT.

1. Was this contempt proceeding properly constituted without an affidavit made for the purpose of supporting the order to show cause, and did the court have jurisdiction thereof?

Point 1 (R. 159).

Point 3 (R. 164).

Point 4 (R. 164).

This proceeding against Nye and Mayers seeks to present a case of constructive or indirect civil contempt. There is nothing that savors of criminal contempt in the findings (R. 1-6) or in the evidence. Plaintiff Elmore contended that his rights were invaded because the respondents pro-

cured him, while under the influence of liquor and by use of undue influence, to execute papers that he did not desire to execute. These papers were to be, and were, filed in the Superior Court of Robeson County, North Carolina, and upon their face called for a discharge of the plaintiff Elmore as Administrator of James Elmore, and all the transactions referred to in all the conventions took place in Lumberton, Robeson County, North Carolina, in the Eastern District, some 115 miles by the usual route of travel from Durham, where the suit for wrongful death was pending in the District Court for the Middle District of North Carolina. So much of the evidence as relates to transactions in South Carolina were some 40 miles farther away. There is no evidence in the record that the District Court was in session at Durham at that time or that the District Court knew of the facts disclosed in the testimony until September 29, 1939, when it was hearing a motion to dismiss the damage suit. Finding 12 (R. 153).

The court had no personal knowledge of the matters shown in the evidence and, therefore, it was necessary that the facts be set forth in an affidavit before the court in order to give the court jurisdiction to issue the order to show cause, and this rule seems to be uniformly recognized.

2 A. L. R. 225;

In Re Deaton, 105 N. C. 59, 64;

Sona Aluminum Castings Co., 131 C. C. A. 232, 214 Fed. 326.

This latter case states: "Process of arrest for contempt not committed in the Court's presence can properly issue only upon the filing of affidavit stating positively the facts and in such a way as prima facie to show the commission of a contempt. This is the generally recognized rule."

The District Court evidently had this rule in mind in issuing the order to show cause, for it recited (R. 8), "And it

appearing to the Court that W. H. Elmore, on oath, testified to facts that the said R. H. Nye and L. C. Mayers have been guilty of behavior contemptuous of this Court."

The testimony of Elmore (R. 165) was given on September 29th on an entirely different matter, to-wit, the defendants' motion to dismiss the suit for wrongful death, and was not given for the purpose of initiating a contempt proceeding.

State v. *Blackwell,* 10 S. C. 35;
Whittim v. *State,* 36 Ind. 196;
In Re Nickell, 47 Kans. 734;
In Re McKenna, 47 Kans. 738, 28 Pac. 1076-1078;
Ex Parte Laundry, 65 Tex. Criminal Rep. 440, 144 S. W. 962;
In Re Colter, 35 Wash. 526, 65 Pac. 759;
Ward v. *Arenson,* 10 Bosw. (N. Y. 589);
Perry v. *Kausz,* 167 Ill. App. 250;
In Re McCarty, 154 Cal. 534, 98 Pac. 540;
Ex Parte Hedeen, 29 Nev. 352, 90 Pac. 737, 13 Ann. Cass. 1173;
State v. *Thompson,* 2 Ohio Dec. Reprint 30;
Ex Parte Foster, 44 Tex. Crim. Rep. 423, 60 L. R. A. 631, 71 S. W. 593;
York v. *State,* 89 Ark. 72, 116 S. W. 948;
State ex rel. Gammell v. *Clancy,* 24 Mont. 359, 61 Pac. 987;
State ex rel. Flynn v. *District Ct.,* 33 Mont. 115, 82 Pac. 450;
Charles Cushman Co. v. *Mackesy* (Maine), 200 Atl. 505, 118 A. L. R. 148;
Blackstone's Commentaries, 1807 Ed. Vol. 4, 286;
Staley v. *South Jersey Realty Co.,* 83 N. J. Eq. 300, 90 Atl. 1042, 40 Am. English Ann. Cass. 1916-B, 955;
West Jersey Traction Co. v. *Camden,* 58 N. J. L. 362, 33 Atl. 966;

Hotaling v. *Superior Court,* 217 Pac. 73 (Cal.), 29 A. L. R. 127;
State v. *Reynolds,* 204 Fed. 709, 123 C. C. A. 13;
Hillmon v. *Mutual L. Ins. Co.,* 79 Fed. 749;
Gompers v. *Buck's Stove & Range Co.,* 221 U. S. 418, 31 S. St. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

The petitioners contend that it was necessary that an affidavit showing contempt should be filed as a basis for the order to show cause and that the testimony of Elmore taken on another motion and the unverified motion of Elmore's counsel, were insufficient to comply with this rule and that such testimony and motion did not disclose facts giving the court jurisdiction to proceed as it did proceed in constructive civil contempt.

2. Were the respondents (petitioners here) guilty of contempt?

This question involves, first, the power of the District Court to proceed in the original cause, wherein Elmore, Administrator, was plaintiff, against the B. C. Remedy Company in the manner used, wherein the District Court sought to determine the guilt of the petitioners under Judicial Code, Section 268, U. S. C. A. 385. This Act, approved 24 September 1789, contained only the following: "This Court shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority."

Thereafter much controversy arose with respect to the exercise of this power by the Federal judiciary, and one phase of this controversy resulted in the impeachment by the House of Representatives of a District Judge of Pennsylvania. This District Judge was acquitted in the impeachment proceeding, but out of it grew the amendment approved March 2, 1831, to-wit: "Such power to punish

contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice * * *."

The remainder of this section applies to officers of the courts and official transactions, including disobedience or resistance by such officers, jurors or witnesses, or other persons, to writs, process, orders, rules, decrees and commands of the Court, and is not involved in this case.

The Court below attempted to proceed upon the clause, "So near thereto as to obstruct the administration of justice."

It is generally conceded that the power of Congress is plenary in respect to statutory courts which it establishes, and that included in the term "the said courts" is the District Court. The amendment, approved March 2, 1831, containing the clause, "So near thereto" is, necessarily, a limitation.

Cuiler v. *Atlantic R. Co.*, 131 Fed. 97 (4th Circuit).

U. S. v. *Toledo Newspaper Co.*, 237 Fed. 986, 150 C. C. A. 636, 247 U. S., 402, 62 L. Ed. 1186.

Kreplik v. *Couch Patents Co.*, 190 Fed. 565, 111 C. C. A. 381.

Morgan v. *U. S.*, 95 Fed. (2) 830.

It is clear that nothing was done in the presence of the District Court, and the Court relies upon in its judgment, the words, "So near thereto" (R. 158).

The constructions of the words, "So near thereto" present an interesting contrariety of the opinion in the lower courts. The conduct alleged against the petitioners cannot be construed as an affront to, or interference with, the Court in its functions. In fact, the Court in its judgment (R. 153) says, referring to its direction that the petitioner Nye pay Guthrie, plaintiff's attorney, $500.00 (R. 158), that it was "through whose (Guthrie's) untiring efforts and at great

expense discovered and brought to the attention of the Court the contempt for its authority", and further says in this judgment (R. 158), "The Court is of opinion and so holds that the conduct of the respondents is misbehavior so near to the presence of the Court as to obstruct the administration of justice."

The District Court proceeded as in civil contempt. The caption in its findings of fact and judgment (R. 153), in its order to show cause (R. 8), in the motion of plaintiff's counsel (R. 8-12), in the Court minutes showing denial of motions and exceptions (R. 16), and in the motions filed by the petitioners (R. 13, 15, 16) is the caption of the suit for damages for wrongful death, to-wit, "W. H. Elmore, Administrator, etc. against C. T. Council and others, trading as B. C. Remedy Company." There was no order entered characterizing the charge as criminal contempt and the charge took place, if at all, so far from the District Court that it knew nothing about it until the efforts of plaintiff's Counsel, and the testimony of Elmore on the motion to dismiss the main action (R. 7) brought it to the attention of the Court.

A civil contempt cannot be based upon the "So near thereto" portion of Section 385, U. S. C. A. Title 28.

In Re *Sixth & Wisconsin Tower, Inc.*, 108 F. (2) 538, 540 (C. C. A. 7).

This case includes the distinction between civil and criminal contempt.

In *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S., 418, 448, 31 S. Ct., 492, 501, 55 L. Ed., 797, 34 L. R. A. (nS), 874 (C. C. A. 7), it is concluded that the respondents in that case could not be punished for civil contempt under section 385.

While it is admitted in In Re Sixth & Wisconsin Tower, *supra*, that the case was civil contempt and not criminal, the Court says "It is plainly such."

Terminal R. R. Ass'n v. *United States*, 266 U. S., 17, 45 S. Ct. 5, 69 L. Ed. 150;
Bessette v. *W. B. Conkey Co.*, 194 U. S., 324, 24 S. Ct. 665, 48 L. Ed., 997;
In re Fox, 3 Cir., 96 F. (2d) 23.

In *Gompers* v. *Buck's Stove & Range Co., supra*, it seems definitely to be held that if the contempt matter is proceeded with in the original cause, as appears from captions of findings of fact and judgment (R. 153), order to show cause (R. 8), minutes showing denial of motions and exceptions (R. 16), and motion of plaintiff's counsel, Guthrie (R. 9), that the contempt proceeding in the instant case grew out of, and was dependent upon, the main or primary case of *W. H. Elmore, Administrator of James Elmore, deceased* v. *Council and Bernard, partners as B. C. Remedy Company.* Therefore, the District Court proceeded for constructive civil contempt under the "so near thereto" clause of Section 385, when it did not have power to proceed for civil contempt and did not have power to enter a judgment otherwise.

It is vitally necessary for the protection of the citizen that he be advised clearly whether he is proceeded against for civil or criminal contempt.

The citizen "should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge, but to know that it is a charge and not a suit.

Gompers v. *Buck's Stove & Range Co., supra;*
United States v. *Cruikshank, et al.*, 92 U. S., 542, 569, 23 L. Ed. 588, 593.

In *McCann* v. *New York Exchange*, 80 Fed. (2) 211, the Second Circuit Court of Appeals suggests that it can be made plain to the respondent if the Judge enters an order *in limine*, directing the attorney to prosecute the respondent

criminally on behalf of the Court, and then says: "We think that, unless this is done, the prosecution must be deemed to be civil and will support no other than a remedial punishment." A reversal was entered because this was not done.

The view thus set forth is in full accord with *Gompers v. Buck's Stove & Range Co., supra.* If criminal contempt be proceeded with as civil contempt, then the Court is without power to render a punitive judgment and, of course, it could not render a remedial judgment. When inquiry is made into the heart of this proceeding there can be found no affront or obstruction that relates to the District Court. If undue influence was asserted to obtain from Elmore a discharge from his administration in the probate court of Robeson County, North Carolina, then *ex vi termini* there can be no contempt of the District Court in which the suit for damages for wrongful death was pending. The plaintiff must maintain his living status as administrator in the probate court of Robeson County in order to sue for damages for wrongful death. If he does this then, under the Lord Campbell Act, he can maintain his suit for damages as a mere naked trustee for the next-of-kin of his intestate. This right exists in no other person than the personal representative of the deceased. The District Court has no probate jurisdiction and nothing whatever to do with the qualification or discharge of administrators. The plaintiff in making his case must allege, and if denied, prove that he is the administrator of the deceased. The probate court necessarily maintains exclusive power to appoint and discharge administrators to such court.

If, perforce, the conduct of the petitioners may be construed as hostile to any court, then this hostility related to the probate court and not to the District Court, which only had a right to entertain the action for wrongful death as long as Elmore remained administrator of his intestate

and the effect on the District Court from a discharge in the probate court must needs be only incidental.

The petitioners say they did nothing "in a corner", but that Nye, feeling that he was befriending Elmore, took him to the lawyer's office in whom Nye had confidence, as is shown by the fact that he had employed this lawyer to attend to his affairs, and all the evidence shows that, in the lawyer's office, Elmore talked to the lawyer and that Nye ceased to talk when he had told the lawyer the desire that Elmore had made known to him. The evidence is plenary (R. 73) from a deputy clerk, Miss Jenkins, that the Clerk who died prior to these hearings, talked with Elmore and that Elmore gave him his reasons and stated that Mr. Carlyle, a lawyer, had told him that he did not think he could win his damage suit and that after this conversation the Clerk accepted his affidavit and final account and approved it and thereby discharged Elmore as administrator. If the affidavit and final account had been contemptuously procured by the petitioners and filed in this probate court, then whatever powers in respect to punishing the petitioners for such conduct, resided in the probate court and not in the District Court.

In fact, it would seem far fetched to contend that the District Court, which had no concern with the administration of the estate of which W. H. Elmore was administrator, could be interfered with or obstructed in the performance of its duty by acts done in or with reference to the probate court, if undue influence had been asserted upon Elmore to obtain papers closing his administration, then his remedy was by appropriate proceeding in the probate court. The judgment of the trial court in the contempt proceeding results in punishing the petitioners to protect the rights of Elmore, administrator, when, in fact, the record does not disclose that Elmore's rights have been invaded.

The petitioners say they were not guilty of contempt in fact. They contend that the Finding, No. 19 (R. 153) made by the District Court with respect to the petitioner Nye and his business ability and mentality and energy, constitutes merely the Court's opinion of him and does not state a fact that should be held against him, and that there is no basis in the evidence (R. 26, 153) that Elmore was kept from his son's home, or that Nye and Mayers arranged to keep Elmore in their presence until the next morning after the papers were executed, when the evidence (R. 29-30) shows that Elmore did not want to go to the home of his son living in Lumberton and that Elmore suggested that he go to the home of Mayers who had no place that he could take him at that time (R. 137).

The Court concludes, Finding No. 21 (R. 157) that all that Nye did by procuring the writing of the letters to the Court and to plaintiff's counsel, Guthrie, were for the purpose of presenting the prosecution of the civil action in the Federal Court and to obstruct and prevent the trial of the case on its merits. While the Court says that such did cause a long delay, several hearings and expense, there is no finding that Elmore's rights were prejudiced or that the suit in the Federal Court was discharged on account of the filing of the final account in the probate court of Robeson County, North Carolina.

That Elmore may be illiterate and feeble in health and mind certainly does not relate to an invasion of Elmore's rights.

It is submitted that the evidence does not show that Nye furnished any liquor to Elmore or to Mayers, and while Elmore contends that Nye had him to do what he did and that he did not understand it, the testimony of disinterested and unrelated witnesses in large number, make this impossible. While Elmore claimed that he was drunk all the

time he was in Lumberton, the trial court, in Finding No. 23 (R: 158) says Elmore did not remain intoxicated while he signed the letters and false final account, but he was completely under the control and domination of Mayers and Nye, and the Court further finds that neither of the respondents (petitioners here) paid Elmore any sum or promised him any sum whatever to get the case stopped. That Elmore was under the influence of Nye and Mayers was a conclusion. We submit that it would not be contempt or undue influence or a trespass on the rights of Elmore, or contempt of court for one to ask his friend or neighbor to withdraw a law suit against himself, or a kinsman, or a friend, or some person that was neither. The liberty of the citizen certainly is not contemptuous if properly used to end strife and litigation, and unless there is a fraudulent substitution of the mind of the petitioner for the mind of Elmore, then the petitioner has committed no civil trespass. The right of free speech and the right to express one's opinion and to make one's wishes known have not been banned under the present order.

We submit that the evidence fails to show that Nye procured Mayers to go to South Carolina to get Elmore or that he gave him any liquor or expense for the trip. Mayers denies that they did either of these and Nye denies such conduct and no witness testifies that he did either. The trial court concludes that he did from the testimony of Elmore that Mayers gave him liquor.

The petitioners call the attention of the Court to the present style of the caption in this matter. The caption proceeded uniformly until the appeal was filed in the Circuit Court of Appeals for the Fourth Circuit, to be the caption of the suit for damages for wrongful death, but the Clerk of the Circuit Court of Appeals on account of the fact that the judgment of the District Court (R. 158)

required the petitioner Nye to pay $500.00 to Guthrie, plaintiff's attorney, and to pay a fine of $500.00 which, if paid, went to the United States, and that Mayers was required to pay a fine of $250.00, constituted the caption in the Circuit Court of Appeals as "Nye and Mayers vs. United States and Guthrie". The United States Attorney and his Assistant on May 1, 1940 entered an appearance in the Circuit Court of Appeals for the United States of America and until that date, which was after the filing of the transcript of the record in the Circuit Court of Appeals on April 20, 1940, was the first notice that the Department of Justice took of this matter, so far as the record is concerned. Evidently, this appearance, and subsequent appearances, were on account of the amounts taxed by the District Court as fines which were payable to the United States of America, according to the terms of the judgment. Our contention is that the mere styling of the caption in the Circuit Court of Appeals does not relate back and convert this proceeding into criminal contempt and that the petitioners are not guilty in the premises.

3. Did the judgment of non-suit rendered herein by consent of plaintiff on 13 March, 1940, undermine and render the judgment against respondents in contempt, void?

On 13 March, 1940, pending the appeal to the Circuit Court of Appeals for the Fourth Circuit, wherein the record was filed on April 20, 1940, the plaintiff procured a judgment of voluntary non-suit in the District Court of the United States in his suit as administrator of James Elmore, deceased against B. C. Remedy Company. This judgment is in usual form of a voluntary non-suit and the cost was taxed against the plaintiff (R. 25). This judgment is assented to by counsel for the plaintiff and by the plaintiff in his capacity as administrator, and personally. Petitioners contend that when this non-suit was taken the plaintiff was satisfied to have his suit dismissed and that he was not will-

ing to prosecute further. Whether plaintiff could proceed by another suit after having taken a voluntary non-suit is of no concern here, because this judgment effectively disposes of the primary action in which, and as a part of which, the contempt proceeding was had. If this proceeding is for civil contempt, then there can be no further remedial process to the aid of the plaintiff when he has voluntarily dismissed his suit. In *Gompers* v. *Buck's Stove & Range Company, supra,* it is indicated that in civil contempt when the main case is settled and adjudicated that the contempt falls with it. The Court says: "The present proceeding necessarily ended with the settlement of the main cause of which it is a part", and directs that the criminal sentences imposed in the civil case, therefore, should be set aside.

Bessette v. *Conkey,* 194 U. S., 328, 333; 48 L. Ed. 1002;
Worden v. *Searis,* 121 U. S., 27; 10 L. Ed., 858;
State v. *Nathans,* 49 S. C., 207.

How can the house of contempt stand when its foundation has been washed away?

The following cases indicate that the foregoing rule has been widely applied.

Eustace v. *Lynch,* 80 F. (2d) 656.

When the main case has been settled the contempt question becomes moot, because nothing can be then done to give the Court jurisdiction to grant the relief sought in the motion filed to have the respondent adjudged in contempt. The Courts do not pass upon moot questions.

City of Clearwater, Florida v. *Beers,* 90 F. (2d) 80, 82.

In *Leman* v. *Krentler-Arnold Hinge Last Co.,* 284 U. S. 448, 76 L. Ed., 389, 394, the Court referred to the fact that the proceeding was heard and determined as for civil and not criminal contempt and then says: "The question of the relation of such a proceeding to the main suit was fully considered in the case of *Gompers* v. *Buck's Stove & Range*

Co., 221 U. S. 418, 55 L. Ed., 797, 34 L. R. A. (N. S.) 874, 31 S. Ct. 492, and it was determined that the proceeding was not to be regarded as an independent one, but was a part of the original cause. The Court said: "'Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause.'"

In *Terminal R. R. Association* v. *United States*, 69 L. Ed., 151, 266 U. S. 17, speaking to the question of contempt, the Court says:

> "In these proceedings the United States did not join in the complaint or participate in the hearing in the District Court, but has since appeared and is aligned with the appellees. The proceedings were instituted by the west-side lines not to vindicate the authority of the Court, but to enforce rights claimed by them under the original decree. The controversy is between them and and the east-side as to whether the former or the latter shall bear transfer charges on west bound through freight. The nature of the proceedings is civil and remedial, not criminal."

WHEREFORE, petitioners pray that the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed, with directions to the District Court to dismiss the proceeding and that error be declared in the judgment of the District Court and that such other orders in respect thereto be entered as may be proper.

Respectfully submitted,

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